Supreme Court, U.S.
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No. 03-1007

IN THE
Supreme Court of the United States

FREEDOM NY, INC.,

Petitioner,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

The three reasons stated by the Solicitor General for denying the writ of certiorari are specious.

I.

THIS COURT FREQUENTLY REVIEWS DECISIONS OF COURTS OF APPEALS THAT REVERSE FINAL JUDGMENTS OF DISTRICT COURTS

The Solicitor General's initial assertion is that the decision of the court below is "interlocutory" and should therefore not be reviewed under the prudential principle that this Court "generally awaits final judgment before exercising its certiorari jurisdiction." Brief for the Respondent in Opposition ("Gov't Br.") 7-8. In fact, the decision that was before the court below was, in all respects, a "final judgment" and was not, in any fashion, "interlocutory." It was entered after a full trial on the merits before the Armed Services Board of Contract Appeals, and it fully concluded the litigation that had been initiated with the filing of the petitioner's complaint.

Additional proceedings may be necessary only because the court below erroneously vacated a final judgment, thereby leaving for possible future resolution issues that were not reached in the initial decision of the Armed Services Board of Contract Appeals. If, as petitioner contends, the ruling of the appellate court is reversed, the final judgment will be reinstated and the litigation will be over.

This is not, therefore, the procedural posture contemplated by the prudential rule discussed in R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18, pp. 258-261 (8th ed. 2002), or in Justice Scalia's concurring memorandum on the denial of certiorari in

Virginia Military Institute v. United States, 508 U.S. 946 (1993). When a trial court's judgment is itself interlocutory or when, as was true in the *Virginia Military Institute* case or in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (which is routinely cited in support of the same proposition), substantial questions relating to the remedy below remain unresolved, this Court stays its hand until the litigation is finally concluded. In those instances, there must be further proceedings in the lower court irrespective of the validity of the appellate court's determination. It is possible that the resolution of those additional proceedings will obviate the necessity for further review by this Court. In addition, review by this Court is, in these circumstances, premature prior to the trial court's disposition of issues that the trial court will have to consider in any event.

But the rationale of that rule is wholly inapplicable to a case in which the trial court's judgment is "final" in every respect and requires no additional proceedings whatever, and where the only obstacle to immediate enforcement of that final judgment is a reversal by an appellate court based on a challenged legal conclusion. Timely review by this Court and reversal of the appellate court's decision, resulting in reinstatement of the final judgment, will conserve judicial resources and make it unnecessary for the parties to engage in costly and burdensome litigation over issues that need not be reached.

In the 2002 Term of Court, for example, this Court decided *Dole Food Company v. Patrickson*, 538 U.S. 468 (2003) (court of appeals' reversal of dismissal and remand for further proceedings); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (court of

appeals' reversal of summary judgment for defendant and remand for further proceedings); *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (court of appeals' reversal of summary judgment for defendants and remand for further proceedings); and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (court of appeals' reversal of dismissal of complaint and remand for further proceedings). In each of these cases, final judgments of the trial court were reversed by the court of appeals and the case was remanded for additional proceedings.

And in the preceding Term this Court granted certiorari in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002), in which a final judgment for the plaintiff was reversed and remanded by the Federal Circuit – precisely the procedural posture of this case. It was not suggested that this Court must await the outcome of the remand proceedings before reviewing the judgment of the court of appeals. If the rule invoked by the Solicitor General were applicable to all cases in which the court of appeals has remanded for further proceedings, the Court should never have agreed to hear the cases we have just cited and discussed until the proceedings contemplated by the appellate decision had been concluded.

If, as petitioner contends, the Federal Circuit erred in vacating the final judgment of the Armed Services Board of Contract Appeals, the Federal Circuit's decision should be reversed and the ASBCA's judgment should be enforced. That decision can and should be rendered at this juncture of the litigation and should not be delayed merely because the Federal Circuit remanded the case for consideration of other issues that need never be resolved.

II.

NO RATIONAL "LOCAL WAIVER RULE" REQUIRES AN APPELLEE TO ANTICIPATE A COURT'S REVERSAL ON GROUNDS NOT ARGUED IN AN APPELLANT'S BRIEF WITH A FULL-FLEDGED PRESENTATION OF AN ALTERNATIVE GROUND TO SUSTAIN THE LOWER COURT'S DECISION

The Federal Circuit plainly erred when, in denying rehearing partly on "waiver" grounds, it cited precedents that held that "an issue not raised *by an appellant* in its opening brief . . . is waived." Petition Appendix B, p. 29a (emphasis added). Since petitioner was *appellee* in the Federal Circuit (and was a cross-appellant on issues that are not germane to this petition), the cited precedents are clearly inapplicable. Policy and precedent clearly establish that an appellant has waived arguments that he does not assert in his presentation of the grounds for reversal. *E.g., Morfin v. City of East Chicago,* 349 F.3d 989, 1000 (7th Cir. 2003); *United States v. Taylor,* 339 F.3d 973, 977 (D.C. Cir. 2003); *Bickel v. Korean Air Lines Co.,* 96 F.3d 151, 153 (6th Cir. 1996).

The situation of an appellee, who is defending the judgment below against the arguments made by his adversary, is entirely different. If there are alternative grounds to support that judgment, he may -- and probably should -- present them in his responsive brief. But he surely has no obligation in that brief to counter, with an extended discussion of the facts and law, arguments that the appellant's brief does *not* make -- merely on the hypothetical possibility that the appellate court will seize on one such argument as a ground for reversing the judgment below.

That is what happened in this case. As we noted in our Petition (p. 7), the government's appeal to the Federal Circuit did not challenge the ASBCA's conclusion regarding Modification No. 25. In its reply brief – *for the very first time in its appeal* – the government asserted briefly that any "alleged oral side agreement" was "a nullity." Although the validity of the "side agreement" was not, therefore, directly challenged on the government's appeal, the Federal Circuit found the "side agreement" to be invalid on grounds that had not been argued by the government. It was in this context that, on rehearing, the panel of the Federal Circuit asserted astonishingly that the petitioner had "waived" its legal response to the unanticipated *ratio decidendi* of the Federal Circuit by not presenting a full-fledged defense of the validity of the "side agreement" in its appellate briefs.

The Solicitor General avoids this remarkable "waiver" ruling by asserting that "the application of local waiver rules lies within the court of appeals' discretion" and that the Federal Circuit could have decided that it was "insufficient" merely to cite the Board's finding in the appellee's brief. Gov't Br. 8-9. The Solicitor General fails to cite a "local waiver rule" that was, in fact, applicable to these facts and on which the Federal Circuit allegedly exercised some "discretion." We submit there is no such "local waiver rule" because, in the circumstances of this case, it would be plainly irrational, unjust, and an abuse of discretion to foreclose an appellee from bringing to the appellate court's attention on petition for rehearing the detailed reasons why its *sua sponte* decision is wrong as a matter of fact and law.

III.

IT IS NOT A "REASONABLE INTERPRETATION" OF THE ASBCA'S FINDINGS TO READ THEM AS FINDING THAT THE "SIDE AGREEMENT" WAS "SEPARATED FROM MODIFICATION 25"

The Solicitor General asserts that the Federal Circuit did not reject the Board's findings because the ASBCA's findings could be interpreted as concluding that the letters comprising the "side agreement" were not "attached to Modification 25 when the government signed it." Gov't Br. 9-10. That reading of the ASBCA findings is absolutely untenable.

Paragraph 93 of the ASBCA's Opinion (Pet. App. C, p. 64a) reads as follows:

> 93. On 29 May 1986, Henry Thomas and consultant Francois met with PCO Bankoff. Mr. Thomas had a 28 May 1986 letter to DLA's R. Chiesa (ex. G-40), conforming in substance to the 2 May 1986 version, attached to proposed Modification No. P00025 (P00025). Mr. Bankoff saw the 28 May date of that letter, and provided an essentially identical FNY 13 May 1986 letter to Mr. Chiesa, which Mr. Thomas attached to Modification No. P00025. Mr. Bankoff said that he would send that letter to Mr. Chiesa for approval. At 11:00 a.m. DPSC telefaxed to DLA headquarters a copy of the signed 13 May letter. Mr. Thomas heard no objection to the 13 May letter, understood that Mr. Chiesa

> had agreed, and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025. (AR4, tab M25; ex. FT280; tr. 643-51, 2047-49)

The second sentence of the Finding declares that the letter reciting the additional terms was "attached to proposed Modification No. P00025" when Mr. Thomas brought it to the meeting of May 29. It also recites that PCO Bankoff "provided" an "essentially identical" letter, and that Mr. Thomas "attached" that "essentially identical" letter to the Modification. PCO Bankoff then sent "that letter" to Mr. Chiesa of the Defense Logistics Agency ("DLA") "for approval." The ASBCA determined that Mr. Thomas signed Modification No. 25 because the silence of DLA manifested its agreement to the letter that had been "attached" and was faxed to DLA. And Paragraph 94 of the ASBCA's Opinion stated that the ASBCA gave "no probative weight" to PCO Bankoff's "denial of the 'side agreement' *attached to* P00025" (emphasis added).

At no point in these ASBCA findings is it remotely suggested that the additional terms were "attached" only to Mr. Thomas' documents. According to the ASBCA's findings, the "side agreement" was "attached" by Mr. Thomas to Modification No. 25 before he brought that document to the meeting of May 29. The additional agreement was seen and read by PCO Bankoff who provided "an essentially identical" letter that Mr. Thomas "attached" again to Modification No. 25. After the agreement was faxed to DLA, Modification No. 25, with an "attached" side agreement, was signed by PCO Bankoff.

The plain meaning of the ASBCA findings is that the side agreement was attached to the Modification. If the Federal Circuit concluded that it was attached only to Mr. Thomas' copy, that court necessarily overruled and rejected the findings of the ASBCA. There is no reasonable reading of the ASBCA's findings that would support the position of the Solicitor General.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the writ should be granted. The Court may choose to reverse the decision below summarily on the authority of *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

Respectfully submitted,

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